NO. 87-1810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALVIN WARREN and ALFRED WARREN,

Petitioners,

v.

HALSTEAD INDUSTRIES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

ANNIE BROWN KENNEDY
HAROLD L. KENNEDY, III
*HARVEY L. KENNEDY
Kennedy, Kennedy, Kennedy, and Kennedy
710 First Union Building
Winston-Salem, North Carolina 27101
(919) 724-9207

Attorneys for Petitioners

**Counsel of Record*

APPELLATE PRINTING SERVICES, INC. HERITAGE BLDG. RICHMOND, VA (804) 643-7789

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REPLY MEMORANDUM FOR THE PETITIONERS

I.
THE EFFECT OF EVIDENCE OF A GROSS STATISTICAL DISPARITY ON PROVING PRETEXT

Respondent misapprehends petitioner's argument concerning the issue of statistical proof in an employment discrimination case. The petitioners do not contend that

statistics alone can prove discrimination, or that statistics override all other forms of evidence. To the extent that the respondent characterizes the petitioners' position in this light, the respondent misapprehends petitioners' argument. The District Court determined that the petitioners' evidence was sufficient to make out a prima facie showing of retaliatory discharge, and that the respondent had articulated a legitimate nondiscriminatory reason for discharging the petitioners from their employment. The District Court then reached the issue of whether the petitioners had proved that the reasons articulated by their employer for discharging them were pretextual.

In addition to other evidence proving pretext, the petitioners presented evidence of a gross statistical disparity between the discharge rates of black

vis.a.vis white employees. Respondent erroneously argues that the District Court did not reject the statistical evidence, but viewed it in light of all other evidence. To the contrary, the District Court made it clear that it did not give the evidence of a gross statistical disparity any weight. It held as a matter of law that: "Statistics are not sufficient to prove pretext in individual disparate treatment cases." (Appendix to Petition, pp. 104a-105a). This legal holding was affirmed by the Fourth Circuit sitting en banc. It is this legal ruling which is directly in conflict with opinions of other circuit courts.

The Ninth Circuit in Diaz v. American Telephone & Telegraph, 752 F. 2d 1356 (9th Cir. 1985) concluded that statistical evidence can be sufficient in an individual employment discrimination case to

prove pretext. The Court noted that statistical evidence can establish discriminatory intent with respect to the individual employment decision at issue. Other circuit courts have also expressly held that statistics may prove pretext in an individual employment discrimination case. Riordan v. Kempiners, 831 F. 2d 690 (7th Cir. 1987); Powers v. Dole, 782 F. 2d 689 (7th Cir. 1986); Craik v. Minnesota State University Board, 731 F. 2d 465 (8th Cir. 1984). The Third Circuit in an age discrimination case, in Blum v. Witco Chemical Corp., 829 F. 2d 367 (3rd Cir. 1987), recognized that statistical proof was an appropriate method of proving discriminatory intent in an individual case.

Not only do these decisions of the Third, Seventh, Eighth, and Ninth Circuits stand in direct conflict with the holding

of the Fourth Circuit in the instant case, but these decisions are contrary to the decisions of the Second and Fifth Circuits. See Hudson v. IBM Corp., 620 F. 2d 351, 355 (2d Cir.), cert. denied, 449 U.S. 1066 (1980); Terrell v. Feldstein Co., 468 F. 2d 910, 911 (5th Cir. 1972). By failing to come to grips with the fact that the petitioners had already been found by the District Court to have proven a prima facie case of discrimination in discharge, and that the District Court had expressly held that statistics could never prove pretext in an individual discrimination case, the respondent failed to recognize the conflict in the circuits. Certiorari should be granted to resolve this conflict among the circuits concerning an important issue in employment discrimination litigation.

The respondent incorrectly contends

that the decision of the Fourth Circuit in the instant case is consistent with this Court's ruling in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). This Court specifically noted in McDonnell Douglas Corp., supra. that once the court addresses the issue of pretext, statistics may be helpful to show whether the employer's action conformed to a general pattern of discrimination against blacks. Id. at 805. The respondent completely ignores this Court's decisions in Castaneda v. Partida, 430 U.S. 482, 51 L. Ed. 2d 498, 97 S. Ct. 1272 (1977) and in Hazelwood School District v. United States, 433 U.S. 299, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977). In those cases, this Court concluded that when the number of standard deviations are greater than two or three, one must conclude that racial or other class

related factors entered into the decision. In the present case, the number of standard deviations, 9.08 and 8.18 respectively, are so gross that an inference of discriminatory intent has been shown based on the standard enunciated in Castaneda, supra. and Hazelwood School District, supra. The respondent fails to make any attempt to reconcile the Fourth Circuit decision with these decisions. At trial, the respondent failed to produce any evidence to explain the gross statistical disparity or to offer any credible explanation for the wholesale and massive firings of black employees at Halstead Industries.

II.

SHIFTING THE BURDEN OF PERSUASION IN A MIXED-MOTIVE CASE OF RETALIATORY DISCHARGE

Respondent ignores the conflict among the circuits concerning the legal

standards of proof in mixed-motive cases. Respondent incorrectly contends that the instant case involving retaliatory discharge is not a mixed-motive case. The Fourth Circuit panel in Warren v. Halstead Industries, 802 F. 2d 746 (4th Cir. 1986) made it clear that the evidence showed that retaliation played a part in the discharge of both petitioners.

With respect to Alfred Warren, the Fourth Circuit noted various circumstances suggesting that the reason given for his termination was a pretext. First, the Court highlighted the close proximity between the filing of his EEOC charge on January 15, 1979 and the decision to terminate him on January 20, 1979. Second, the Court noted that the Company violated its own stated policies by counting absences against him when he was out of work due to a work-related injury

or illness. If these absences had not been counted, Alfred Warren's attendance record would have been satisfactory. As the Fourth Circuit noted in Footnote 7:

> Halstead's company manual states that 'an employee who sustains an accident on the job which causes him to lose work, as confirmed by a physician, will not be penalized for his absences, provided they do not exceed sixty (60) calendar days.' Nevertheless, Alfred was charged as absent for ten days even though he was receiving Workmen's Compensation for a work-related injury. Again, he was listed eight hours absent on January 6, 1979 when he claims to have begun the shift, had a work injury with a hammer, and been sent home. Also, Alfred claims that on numerous days he was marked as "absent" or "left early" because he suffered work-related problems (specifically, bronchial congestion from breathing cooper fumes) and was sent home with the company's permission.
> (Appendix to Petition, pp. 35a-36a)

Third, the Court pointed out that Alfred Warren's medical excuses were arbitrarily turned down by his employer

without ever telling him. The personnel manager Clyde Allen admitted that he made a "bad assumption" that the doctor who gave Alfred Warren a medical excuse for fatigue syndrome would give anybody a medical excuse. (Appendix to Petition, p. 34a). Finally, the Court noted that there were no objective standards as to what constituted excessive absenteeism. The Court concluded that: "Such a loose, subjective absenteeism policy may indeed be susceptible to manipulation for a discriminatory reason."

With respect to Alvin Warren, the Fourth Circuit also highlighted evidence showing that retaliation played a role in his discharge from employment. First, the Court noted that the employer subjected him to exceptional scrutiny by having notations made on note cards about him and that these kind of note cards were not

kept on white employees. Second, there was the close proximity between Alvin Warren filing his EEOC charge on January 15, 1979 and his discharge on February 2, 1979. Third, the reason given for his discharge was completely subjective, and only served a pretextual purpose. As the Fourth Circuit panel stressed:

> As to the content of the "lack of cooperation" with which Alvin was charged, the testimony shows that the term was hopelessly elastic and subjective and only served a pretextual -- rather than a legitimate -- company function.

Personnel manager Allen described "lack of cooperation" as follows: "It is just a discretionary concept."

Finally, the Court emphasized the gross statistical disparity as showing pretext. Therefore, respondent's contention that the Fourth Circuit did not recognize that the discharges of the

petitioners was based on a mixed-motive is unfounded. The Fourth Circuit made it clear that it had enunciated a higher standard of proof compared to other circuits:

> Even if discriminatory animus or retaliation is "in part" a reason for the adverse employer actions, in this circuit a more stringent standard applies and requires that the plaintiff show that he would not have been discharged "but for" the filing of the charge on the protected activity. Ross v. Communications Satellite Corp., 759 F. 2d 355, 365-66 (4th Cir. 1985).

The Fourth Circuit's "but for" standard in a mixed-motive case under Title VII of the 1964 Civil Rights Act is in conflict with decisions of the Seventh, Eighth, Ninth, and D.C. circuits. These circuits have held that there is a violation of Title VII in a mixed-motive case, if an unlawful motive played some part in the employment decision. Once

this showing has been made by the plaintiff, these circuits have concluded that the burden of persuasion shifts to the employer to prove that it would have made the same decision. See Bibbs v. Block, 778 F. 2d 1318 (8th Cir. 1985); League of United Latin American Citizens v. City of Salinas Fire Department, 654 F. 2d 557 (9th Cir. 1981); Cavidale v. State of Wisconsin, Department of Health & Social Services, 744 F. 2d 1289 (7th Cir. 1984); and Toney v. Block, 705 F. 2d 1364 (D.C. Cir. 1983).

Respondent fails to address the decisions of this Court concerning mixed-motive cases and the shifting burden of proof. In Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 275, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977), this Court set forth the test as to when the burden of persuasion shifts to

the defendant in a First Amendment retaliatory discharge case:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

In Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), this Court also held that when the plaintiff proved that the Village was motivated in part by a racially discriminatory purpose, the burden of persuasion then shifted to the Village to prove that it would have made the same decision even had the impermissible purpose not been

considered.

In the instant case under the 'some part', or 'a factor', or 'a substantial factor' test, the burden of persuasion would have shifted to Halstead Industries to prove that the petitioners would have been terminated from their employment anyway, without consideration of the impermissible factor. Certiorari should be granted to resolve a major and recurring issue of disagreement among the circuits. Whether a litigant prevails in a mixed-motive retaliatory discharge case should not depend on the circuit in which he resides. Uniformity and stability in the law on such an important issue are imperative.

Finally, the respondent erroneously argues that the Court clarified the burden of proof allocations in Texas Dept. of Community Affairs v. Burdine, 450

U.S. 248, 67 L. Ed 2d 207, 101 S. Ct. 1089 (1981), and that this case controls the issue raised here. Respondent fails to recognize that Burdine, supra. was not a retaliatory discharge case where a mixed-motive was involved. This Court has not decided the standard for allocating the burden of persuasion in a mixed-motive case pursuant to Title VII. The cases previously cited by the petitioners on this issue were decided after Burdine. Although this Court's decision in Mt. Healthy City School District Board of Education, supra. and Arlington Heights, supra. appear to be supportive of petitioners' position, those opinions addressed shifting the burden of persuasion in mixed-motive cases under constitutional provisions. This issue has yet to be decided by this Court with respect to Title VII, and certiorari

should be granted to resolve the stark conflict among the circuit courts.

III.

STANDARD OF APPELLATE REVIEW WHEN TESTIMONY IS DIRECTLY CONTRADICTED BY DOCUMENTARY EVIDENCE

Respondent contends that although there was a discrepancy between the contemporaneous employment record of a white employee, Stephen Boles and the oral testimony, the District Court's fact-finding process was permissible because it reconciled this discrepancy. The problem with this argument is self-evident. First, the Fourth Circuit panel noted that there was a direct contradiction in the instant case between respondent's contemporaneous documentary records and the testimony of its witnesses in this regard. The Court pointed out that the record clearly showed that Boles was promoted to a temporary leadman for

thirteen weeks and not two weeks, that he was not a temporary substitute for two weeks because he never returned to his previous job as a bench operator, that his pay never reverted to what he was making before he was made a temporary leadman, and that after the thirteen weeks he was promoted to a regular leadman. Although Halstead's personnel manager, Clyde Allen, characterized the company record as a mistake, he failed to produce for the Court the paycard or payroll register which he contended would show whether the contemporaneous employment record was correct or not. This led the Fourth Circuit panel to conclude:

> It is not the appropriate role for a court to second-guess the evidence before it and rely on one party's contention that it 'could have' brought the evidence supporting its story to the fact-finder. On their face, the company records corroborate plaintiffs' claim that a white employee

> with six-weeks less seniority was promoted over them . . . We have no choice but to find the district court's Finding of Fact #8 and its conclusion of law based on that finding to be clearly erroneous. (Appendix to Petition, p. 63a).

Second, not only do the documentary records contradict respondent's oral testimony, but the testimony positing that Boles worked as a temporary leadman for two weeks and then reverted to his previous job was based solely on speculation and surmise. On cross-examination, Allen admitted that his speculation was uncertain at best:

> ALLEN: On the entry of 12-18-78 it shows a temporary leadman. As best I remember there was another entry that should have gone in after that taking him back to bench operator after one week, I believe that was regarding a temporary one week upgrade.
> Q. You're not sure of that?
> A. No, I'm not.
> (Vol. V, 4th Cir. Jt. App., p. 103)

Respondent mischaracterizes petitioners' position by contending that

petitioners have argued that documentary evidence should be favored over oral testimony. Petitioners have not made such an argument. What petitioners do contend is that the factfinding process employed by the District Court with respect to this issue was contrary to this Court's decision in United States v. United States Gypsum Company, 333 U.S. 364, 92 L. Ed. 746, 68 S. Ct. 525 (1948). Although the trial court has the opportunity to assess the credibility of witnesses, when such testimony is in conflict with contemporaneous documents which were kept by the respondent in the usual course of business, such testimony is entitled to little weight. Gypsum, supra. at 396. The factfinding process of the District Court was inconsistent with this Court's previous ruling in Gypsum and with Rule 52(a) of the Federal Rules of Civil

Procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANNIE BROWN KENNEDY
HAROLD L. KENNEDY, III
*HARVEY L. KENNEDY
Kennedy, Kennedy, Kennedy
and Kennedy
710 First Union Building
Winston-Salem, North Carolina 27101
(919) 724-9207

Attorneys for Petitioner

*Counsel of Record